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Supreme Court U.S.
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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

LORETTA R. MALLEY,
Petitioner,

v.

WILLIAM L. MALLEY,
Respondent.

On Petition for Writ of Certiorari to the Pennsylvania Supreme Court

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Background: In 1967 a Pennsylvania court held that a court in Juarez, Mexico did not have jurisdiction over the marriage of Husband (Respondent/Defendant below), who had filed papers for a "Mexican divorce" from his wife (Petitioner). Both parties were, at the time, residents of and domiciled in Pennsylvania. Between 1967 and 1987 Husband paid support to Wife under a Pennsylvania court Order, but never in the full amount due. In 1968 Husband appealed Wife's entry of an arrearage judgment against him, claiming improper original service. Pennsylvania courts rejected his challenge to the validity and jurisdictional basis of the underlying support action and judgment. Between 1970 and 1990, Wife entered seven more arrearage judgments against Husband for failing to pay the full amount of court-ordered support. In 1991 a Florida court "ratified and affirmed" an unrecorded "Mexican Divorce Decree," purportedly issued in 1967 "divorcing" Husband from Wife. The "Decree" has never been served on Wife and is not part of the record. In subsequent proceedings to validate Wife's arrearage judgments, Pennsylvania courts have allowed Husband to use the 1991 Florida court decision to nullify the eight judgments entered against him between 1967 and 1990.

Question: Whether or not the lower and appellate Pennsylvania courts erred under the *U.S. Constitution* (Article IV, § 1), by giving an unwarranted measure of "Full Faith and Credit" to the 1991 judgment of the Florida court, in such a way that the previously settled jurisdictional and procedural law of the case was nullified.

PARTIES TO THE PROCEEDING

The Petitioner in this case is Loretta Malley, the plaintiff below.

The Respondent in this case is William L. Malley, the defendant below.

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PETITION FOR A WRIT OF CERTIORARI

Loretta Malley respectfully petitions for a Writ of Certiorari to review a judgment of the Supreme Court of Pennsylvania.

OPINIONS BELOW

The decision of the Supreme Court of Pennsylvania denying Application for Reargument has not been reported as of this date. The decision of the Superior Court of Pennsylvania affirming the decision of the trial court is not reported. Copies of opinions and relevant orders of the Pennsylvania courts and of a Florida court are appended to this Petition (Appendix page numbers will be referred-to as "A-Page No.")

JURISDICTION

The Order of the Supreme Court of Pennsylvania was entered on October 8, 1998 (A-30). A timely Application for Reargument was denied on November 16, 1998 (A-31). This appeal is timely filed and the Supreme Court's jurisdiction is invoked under 28 U.S.C. §1257.

CONSTITUTIONAL PROVISION INVOLVED

The "Full Faith and Credit" Clause provides that:

> "Full Faith and Credit shall be given in every State to the public Acts, Records, and 11129judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings may be proved, and the Effect thereof." *U.S. Const.*, Art IV, §1.

CONCISE STATEMENT OF THE CASE

Introduction

This is a "Full Faith and Credit" case hinging on issues of jurisdiction and law of the case. The lower and appellate Pennsylvania courts have grievously misapplied the *U.S. Constitution*, Article IV, §1, and misinterpreted numerous Supreme Court holdings. The result is an erroneous reversal of three decades of legal proceedings controlling key, "law of the case" issues of jurisdiction and procedure, as well as a complete miscarriage of justice. This is not a "divorce" case.

The issues here transcend the dispute between the parties and rise to a level of important national significance. This case illustrates state court error in applying the "Full Faith and Credit" clause. The Pennsylvania courts have imputed a meaning to a Florida court judgment that is more expansive than is required or warranted under "Full Faith and Credit."

Due to state court error in applying "Full Faith and Credit," a void act has been resurrected, namely a "divorce" proceeding commenced in 1967 in Mexico that was adjudicated at that time by a Pennsylvania court as lacking jurisdiction. Passage of time and different Judges on the bench have given life to an otherwise void act. This illustrates the risk present when cases span long periods of time and/or cross jurisdictional boundaries. The result is conflicting decisions based on a subsequent court's disregard of a prior court's decision. The U.S. Supreme Court has, in this case, a unique opportunity to revisit and clarify fundamental issues of jurisdiction and law of the case, in the context of "Full Faith and Credit."

Summary of Facts & Procedural History

June 1, 1967, in Juarez, Mexico **Respondent William Malley** ("William") secretly filed for a "divorce" from his wife, **Petitioner Loretta Malley** ("Loretta"). Both parties were, at that time, residents of and domiciled in Pennsylvania (A-32, para 1). William went to Mexico for the sole purpose of filing for divorce. Loretta was not in Mexico, nor did she consent to a divorce.

The only notice Loretta ever received of William's action was a "Notice of Commencement" of the Mexican proceeding, sent to her home in Pittsburgh and received by her on June 30, 1967. Loretta immediately challenged William's Mexican action in Pennsylvania court by filing for a "Divorce From Bed & Board" and requesting injunctive relief; both of which were granted (A-32, A-34)[1].

September 7, 1967 a Pennsylvania trial court (through Judge ALDISERT, now a Senior Chief Judge of the US Third Circuit Court of Appeals) held that Mexico lacked jurisdiction over the Malleys (A-32, para 2) and ordered William to pay "alimony pendente lite" (APL), costs and counsel fees (A-34) under then-prevailing Pennsylvania law, 23 P.S. §46. Between 1968 and 1970, Judge ALDISERT's action was upheld by a coordinate trial court (A-35-39)and affirmed on appeal, *Malley v. Malley*, 216 Pa.Super. 760, 259 A.2d 694 (1969) (Alloc. den., 1970) (A-40,41).

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[1] Loretta's original suit was filed July 12, 1967 in Allegheny County Court of Common Pleas, docket 430 & 431 October Term 1967 (caption changed in 1989 to FD-89-6561 for the convenience of the court). The case involved a statutory "Divorce from Bed & Board" under the Pennsylvania Divorce Code of 1929 (23 P.S. §§1-69, Act of May 2, 1929, P.L. 1237 §§1-69, as amended [since repealed]) and a companion "equity" case. "Law" and "equity" were separate actions in Pennsylvania at that time.

After the September 7, 1967 proceedings, William moved to Florida, leaving Loretta and their three children in Pittsburgh. William complied with the APL Order, paying some but not all of the court-ordered monthly APL (findings by Judge LEWIS, A-38-39).

Between 1968 and 1990 Loretta, through counsel, properly entered eight arrearage judgments in Pennsylvania against William due to his under-payment of APL, pursuant to the 1967 APL Order (A-34). The date of entry of the APL judgments, and the amount of each Judgment for arrears are part of the record of the case (A-42) and are as follows:

04-08-68	$ 8,163.25[2]
09-22-70	$ 20,400.00
11-03-71	$ 9,800.00
12-11-72	$ 9,492.00
09-18-74	$ 13,488.00
12-26-79	$ 42,797.00
01-31-84	$ 33,884.68
08-28-90	$ 104,128.43
TOTAL:	$ 242,153.36[3]

The record shows that William never took exception to, nor appealed from any of judgments entered against him in Pennsylvania between 1970 and 1990[4].

In November, 1990 William filed a divorce action against Loretta in Florida. Despite William offering no formal instrument of "Mexican divorce" into evidence, in 1991 William obtained a judgment in Florida courts

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[2] Affirmed on appeal @ *Malley* id.

[3] Amount total does not include interest.

[4] As recently as the August, 1990 judgment William appeared in court in Pittsburgh by counsel, and consented to the $104,128.43 arrearage judgment being entered against him.

(by Judge PHILLIPS, see A-43-44) that "ratified and affirmed" a "Mexican divorce decree" supposedly dated "August 1, 1967." There is no "Mexican divorce decree" attached to the Florida judgment or elsewhere in the record. The Florida judgment was based on William's claim of having commenced "Mexican divorce" proceedings in 1967 in Juarez, where he had traveled solely to file for a divorce.

The 1991 Florida judgment ignored the Pennsylvania court's previous, 1967 determination (A-32, para 2) that Mexican courts lacked jurisdiction over the Malleys. The Florida court held that Loretta was:

> "barred by the doctrine of latches (sic), estoppel, waiver, or a combination of either (sic) or all of them from challenging the validity of the Mexican Divorce Decree." (A-44).

The Florida court noted the existence of Loretta's legal proceedings in Pennsylvania concerning APL, and pointedly made "no ruling on the merits" of her APL arrearage judgments against William (A-44).

As of 1991 William had no assets in Pennsylvania; so after the Florida court made "no ruling on the merits" of her APL judgments, Loretta commenced a separate collection action in Florida where William owned extensive financial and real estate interests. William contested Loretta's legal efforts to collect her judgments against his property in Florida, and for the first time raised his "1967 Mexican divorce" as a bar to the underlying validity of the APL judgments.

In 1994, under the Pennsylvania case she had commenced in 1967, Loretta petitioned for a "Declaratory Judgment" to confirm the validity of the APL arrearage judgments.

On September 26, 1995 a Pennsylvania trial court (Judge FOLINO/A-22) granted "Full Faith and Credit" to the Florida judgment

despite the previous, 1967 holding by a court of coordinate jurisdiction (Judge ALDISERT) that Mexico lacked jurisdiction over the parties (A-32, para 2). Judge FOLINO's 1995 Order (A-22-29) does not state *when* the Malleys became divorced, nor under what legal jurisdiction any "divorce" was granted (ie, 1967 under Mexican jurisdiction; or 1991 under Florida jurisdiction). However Judge FOLINO's 1997 opinion[5] holds that the Malleys were divorced in Mexico in August, 1967 (A-15-17). This is the scope of "Full Faith and Credit" that the Pennsylvania court believes is necessary to accord to the 1991 Florida decision, and to which we take exception on constitutional grounds.

By granting "Full Faith and Credit" to the 1991 Florida decision, and holding there was a "Mexican divorce" retroactive to 1967, the Pennsylvania court in 1995 **changed the law of the case** based on the 1967-1970 proceedings. The previous law of the case (Judge ALDISERT's complementary Orders and Judge LEWIS's affirmation, A-32-39) established lack of Mexican jurisdiction and the basis for arrearage judgments that Loretta subsequently entered against William under Pennsylvania law. By applying the 1991 Florida judgment retroactive to 1967, the Pennsylvania court provided William the opportunity to plead the "new" defense, that he was "divorced" as of 1967.

Under the Pennsylvania law controlling divorce in 1967, APL terminated upon the issuance of a decree in divorce. After the 1995 Pennsylvania court interpreted the 1991 Florida judgment as retroactively ratifying a "Mexican divorce" as of 1967, William was permitted to plead a "new" defense in the

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[5] Opinion (A-6) dated March 27, 1997, written and filed at the direction of the Superior Court and after Loretta appealed.

case after almost three decades. William pled the defense of "prior divorce" in opposition to the original APL Order. In consequence, the legal basis for all of Loretta's subsequent APL judgments (1968 thru 1990) vanished (discussed by the lower court at A-16). This 1995 change (A-22)in the previously settled law of the case led to the lower court "opening-up" and reviewing the eight APL judgments[6].

Under an overly broad reading of the 1991 Florida judgment, and the accompanying grant of "Full Faith and Credit," William obtained a critical procedural benefit he would not have received under Pennsylvania law alone. The result was that all eight APL judgments were "zero'ed-out" by the court.

The issue is whether the Pennsylvania courts erred? Was it constitutionally permissible for the Pennsylvania court to grant "Full Faith and Credit" to the 1991 Florida judgment in such a way that it altered the previously settled jurisdictional law of the case and permitted William to plead a "new" defense ("prior Mexican divorce") that otherwise was barred under Pennsylvania law?

Specification of When Federal Question Was Raised

After the Pennsylvania court entered its Order granting "Full Faith and Credit" (dated September 25, 1995, see A-22-29), Loretta filed a timely "Motion for Reconsideration, and/or Leave to File an Appeal From an Interlocutory Order." In an untranscribed, *"in camera"* ruling the trial court declined to permit an appeal from its interlocutory

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[6] The first of which had been affirmed on appeal at *Malley*, supra. (A-40,41); and the subsequent seven of which had not been appealed or challenged at the time of, or after their entry.

decision; however the issue of "when" the parties were divorced (either the date of a supposed "Mexican decree," August 1, 1967 or some date thereafter) was preserved for trial.

The issue of "when" the parties were divorced was not specifically addressed in the trial judge's final order, dated July 11, 1996 (A-5), preceding Loretta's appeal to the Pennsylvania Superior Court[7].

On September 5, 1996 Loretta Malley filed a timely appeal to the Superior Court from the trial court's decision. The trial court opinion, filed March 27, 1997 at the instruction of the Superior Court, addressed the issue of "when" the parties were divorced under a "Full Faith and Credit" analysis (see A-15-17).

The issue on appeal here, of an overly generous extension of "Full Faith and Credit," was briefed extensively by counsel for Loretta to the Superior Court. The Superior Court, in its Opinion issued January 28, 1998, agreed that the matter of "when" the Malleys were divorced was preserved for review (A-3). The Superior Court affirmed the decision of the trial court and declined to grant reargument (A-4).

The issue of an overly generous extension of "Full Faith and Credit" was again briefed extensively by counsel for Loretta on appeal to the Supreme Court of Pennsylvania. That court declined to grant Loretta's Petition for Allowance of Appeal (A-30) and Application for Reargument (A-31); hence this Petition to the U.S. Supreme Court.

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[7] The Pennsylvania lower court did address the issue in its opinion filed March 27, 1997 (A-6).

REASONS FOR GRANTING THE PETITION

Summary of Issues

Respondent William Malley claims to have obtained a "divorce" in Mexican courts on August 1, 1967. However on September 7, 1967 a Pennsylvania court determined that the courts in Juarez, Mexico lacked jurisdiction over the Malleys and the Malley marriage (A-32, para 2). Under Pennsylvania law that controlled the case, the Malleys were not divorced because of failure of Mexican jurisdiction over any "divorce" proceedings in 1967. Despite this lack of Mexican jurisdiction, on August 19, 1991 a Florida court "ratified and affirmed" William's purported 1967 "Mexican divorce," and declared that Loretta was barred from challenging its validity. This brings us to the question presented on the first page, inside the cover of this Petition.

Under a Petition for Writ of Certiorari, the entirety of a case is reviewable. *Christianson v. Colt Industries*, 486 U.S. 800, 817 (1988). In addition, state courts cannot avoid review by the U.S. Supreme Court of their disposition of a constitutional claim by casting it in the form of an "unreviewable finding of fact." *Williams v. North Carolina*, 325 U.S. 226, 236 (1945).

Lack of Jurisdiction Voids "Mexican Divorce" Proceeding

In 1967 a Pennsylvania court declared void the jurisdiction of the Mexican courts over the Malleys, because neither of the Malleys were residents of or domiciled in Mexico (A-32, para 2). When Judge ALDISERT determined that the Juarez court lacked jurisdiction, any "Mexican divorce" action William Malley had commenced was thereby and

thereafter void ab initio by operation of law. Concerning domicile and divorce, the law of the United States is very clear and settled:

> "Under our system of law, **judicial power to grant a divorce--jurisdiction, strictly speaking--is founded on domicile.** (cit. omitted.) The framers of the Constitution were familiar with this jurisdictional prerequisite, and since 1789 neither this Court nor any other court in the English-speaking world has questioned it. **Domicile implies a nexus between person and place of such permanence as to control the creation of legal relations and responsibilities of the utmost significance** (emphasis added)." *Williams*, supra., 325 U.S. at 229[8].

Pennsylvania law in 1967, and presently is that:

> "A decree of divorce is a conclusive adjudication of everything involved therein except the jurisdictional facts on which it is founded, and domicile, of course, is a jurisdictional fact. The bona fides of the domicile is subject to collateral attack in any other State by the spouse who did not appear in the court where the decree of divorce was granted." *Commonwealth v. McVay*, 383 Pa. 70, 118 A.2d 144, 146 (1955), cert. denied at 350 U.S. 995 (1956).

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[8] Pennsylvania follows this domicile doctrine:

> "Domicile... depends on residence plus the intent to make the place a home (cits. omitted.)" *Wallace v. Wallace*, 371 Pa. 404, 89 A.2d 769, 770 (1952)

More generally, when there is no jurisdiction there can be no valid process. Nothing issues from a court lacking jurisdiction, including "Mexican divorces" from a Mexican court lacking jurisdiction. This concept is an elemental tenet:

> "Without jurisdiction the Court cannot proceed at all in any cause. **Jurisdiction is the power to declare the law**, and when it ceases to exist, the only function remaining to the Court is that of announcing the fact and dismissing the cause. **And this is not less clear upon authority than upon principle.** (emphasis added)." *Ex Parte McCardle*, 74 U.S. (7 Wall) 506, 514, (1868).

The jurisdiction of a foreign court is always open to collateral inquiry:

> "(W)here there is no jurisdiction all the acts of the (foreign) tribunal are void. Decrees of divorce, being no exception to this rule, may be collaterally impeached for want of jurisdiction even though the record purports to show jurisdiction (citing *Williams, supra.; other* cits. omitted)." *In re Thorn's Estate*, 353 Pa. 603, 46 A.2d 258, 260 (1946).

Under the jurisdictional facts of the case, the legal outcome of the proceedings on September 7, 1967 was that Loretta Malley was not "divorced" by a Mexican court that had no jurisdiction. As of 1967, there could be no "Mexican divorce" absent Mexican jurisdiction.

Pennsylvania Law in 1967 Controlled "Mexican Divorce" Proceedings

Had there never been any 1991 Florida decision to cloud the issue, the law of Pennsylvania was and remains crystal clear. The law of Pennsylvania disfavors dissolving marriage via forum shopping. There is state law specific to "Mexican divorces," based solely on Mexico being a convenient geographic forum:

> "Mexican divorces have been refused recognition in Pennsylvania. *** They are viewed with scant regard for **pretended jurisdiction** because of public knowledge that they are customarily granted without bona fide residence or domicile. They are generally dismissed with the derogatory description of 'mail order' divorces. (cit omitted, emphasis added)." *Commonwealth v. Doughty*, 187 Pa.Super. 499, 144 A.2d 521,525 (1958), cited with approval at *In re Christoff's Estate*, 411 Pa. 419, 192 A.2d 737, 738 (1963), cert. denied sub nom. *Cozinacis v. Cozinacis*, 375 U.S. 965 (1964)[9].

In a similar case that was part of Pennsylvania law in 1967, the point was made with great prescience:

> "The (husband) knew that the (wife) had

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[9] More recently:

> "(Pennsylvania...) has refused to recognize a Mexican divorce in a situation where a Defendant spouse has not joined in the Mexican proceeding (cits omitted)." *Sargent v. Sargent*, 225 Pa.Super. 1, 307 A.2d 353, 355 (1973)

> never been in Mexico either before or after this divorce. The **pretended judgment** of that (Mexican) court was pronounced upon a 'confession' of the (husband's) wife upon failure to answer after being served with notice to do so in six days.... **No argument is needed to show that this pretended decree was absolutely void** (emphasis added). *DeRosay v. DeRosay*, 162 Pa.Super. 333, 337, 57 A.2d 685, 686 (1948).

This *DeRosay* holding is based on the same domiciliary facts as in this case, and controlled Judge ALDISERT's 1967 Order that the Juarez forum lacked jurisdiction. When Judge ALDISERT determined that Juarez lacked jurisdiction (A-32, para 2), any "Mexican divorce" was voided, and under Pennsylvania law the meaning of the terms "void" and "void ab initio" is quite clear:

> "A void judgment.. (is) one rendered by a court lacking jurisdiction... (and) is a legal nullity for all purposes and subject to direct or collateral attack at any time." See *Keiper v. Keiper*, 343 Pa.Super. 256, 494 A.2d 454, 458-459 (1985).

> "(T)here is a distinction between a judgment which because of procedural irregularities, is voidable merely and one which is void 'ab initio.' The justice **must have jurisdiction of the subject matter, and of the person of the defendant as well, to enter a valid judgment, and for want of jurisdiction the judgment may be attacked at any time. 'It is never too late to attack a judgment for want of jurisdiction of either the subject matter or the person for a fatal deficiency appearing on the**

> **face of the record** (cits. omitted, emphasis added.)' *Green Ridge Bank v. Edwards*, 247 Pa.Super. 231, 372 A.2d 23, 27, n.1 (1977)[10].

Petitioner Loretta Malley had a right to rely upon operation of Pennsylvania law after Judge ALDISERT nullified jurisdiction of the Juarez forum. Loretta had a right to expect that she could not possibly be "divorced" as of 1967 in a Mexican forum which had been judicially determined to lack jurisdiction over her marriage. The contention that, in retrospect, Judge ALDISERT's decision was made "after" a "Mexican divorce" had supposedly issued in August, 1967 (see opinion of Judge FOLINO at A-15) is simply irrelevant to the issue of the underlying validity of a "Mexican divorce." It does not matter "when" a void act occurs; void is void is void. See *McCardle, Doughty, Sargent, DeRosay*, supra, and discussion below.

The 1991 Florida Decision Conflicts With Law of This Case

August 19, 1991 the Florida court issued a judgment (A-43) that "ratified and affirmed" William's purported 1967 "Mexican divorce decree," and barred Loretta Malley from challenging its validity. There is no "Mexican divorce decree" attached to the Florida decision, or elsewhere in the record. The Florida decision supposedly speaks for itself, but what does it say?

Whatever the Florida court was

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[10] These cited cases are merely contemporary restatements of much older holdings. The record in this Malley case is that in 1967 a Pennsylvania court held that the Juarez, Mexico forum lacked jurisdiction (A-32, para 2). Any "Mexican divorce decree" was void *ab initio*.

attempting to accomplish in 1991, it was subject to basic tenets of jurisdiction:

> "(A) court may not in any case, even in the interests of justice, extend its jurisdiction where none exists...." *Christianson*, id.

More specific to the requirement for jurisdiction which supports a decree in divorce, the Supreme Court has held:

> "A judgment of a Court having no jurisdiction to render it is not entitled to the Full Faith and Credit which the Constitution and statutes of the United States demand. (cit omitted)." *Estin vs. Estin*, 334 U.S. 541, 549 (1947).

The Florida court could not have been issuing a 1967-vintage "Mexican divorce" to William Malley that would be entitled to "Full Faith and Credit." That is, Florida courts can only issue Florida divorces, not retroactive Mexican divorces. A Pennsylvania court determined in 1967 (A-32) that there was no jurisdiction in Mexico to divorce the Malleys, hence no divorce could issue. Under law of the case settled in Pennsylvania, from 1967 to at least 1991 any "Mexican divorce" was void.

Also, many years of court-ordered "support" followed the 1967 proceedings. As a result of William's original legal challenge, the Pennsylvania court found that William had "participated" in the case (A-38-39). But in 1991 a Florida court "ratified and affirmed" a so-called "Mexican divorce decree" that is not in the record. There is clearly a conflict between courts of two states over the status of the same marriage.

The Effect of Termination of Marriage Can Vary Between States

The rule that under the "Full Faith and Credit" clause a valid decree terminating a marriage will be conclusive in all states as to marital status of the parties does not require that the effect of the termination of marriage on spousal rights be the same in all states. *Sutton v. Lieb*, 342 U.S. 402, 409-410 (1952). A state remains free to decide for itself the effect of another state's termination of marriage on the inter-spousal obligations of one party to another, *id.* The significance of this point to this case has to do with Pennsylvania mis-applying the 1991 Florida decision to Loretta's pre-existing APL arrearage judgments against William. It is a controlling point of law that the APL judgments were specifically not addressed by the 1991 Florida court; yet they were undermined by an overly expansive application by the Pennsylvania court of "Full Faith and Credit" to the Florida judgment.

Pennsylvania was not obliged to grant, and should not have granted **more** "Full Faith and Credit" to the Florida decision than the Florida decision merited, id. A judgment in one state has no constitutional claim to a more conclusive or final effect in the forum-state (Pennsylvania), than it has in the state where it was rendered (Florida). If the court in the latter state had no jurisdiction over the person or subject matter, the jurisdictional infirmity is not saved under "Full Faith and Credit." See *New York ex rel Halvey v. Halvey*, 330 U.S. 610, 614 (1947). The "jurisdictional infirmity" in this case is that Florida has no jurisdiction to issue "Mexican divorces;" but that is what the Pennsylvania court is reading into the judgment of the Florida

court.

Pennsylvania courts should, and do give "Full Faith and Credit" to Florida divorces issued according to Florida law. If the Florida court was "divorcing" the Malleys as of the date of its judgment on August 19, 1991, then such a result was well within the jurisdiction and power of the Florida court and entitled to "Full Faith and Credit" in Pennsylvania. Even if, based on a literal reading of the Florida judgment, the Florida court was merely holding that Loretta was barred from further challenging the validity of her "divorce" from William after August 19, 1991, then that result may also have been within the jurisdiction and power of the Florida court to issue[11].

One way or the other it appears that the Florida court in 1991 was deciding that the Malley marriage was over, but not explaining "when" in light of the lack of original Mexican jurisdiction.

However well-developed and finely-tuned the law of divorce may be in the State of Florida, Florida courts lack both jurisdiction and power to issue "Mexican divorces," either presently or retroactively. If, *arguendo*, the Malleys had agreed to permit the Florida court in 1991 to apply "Mexican" law to their marital status retroactive to 1967 (which they most certainly did not do!) they could not have properly conferred jurisdiction on the Florida court to issue a "Mexican divorce" because that is something beyond the inherent powers of Florida courts:

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[11] Although under Pennsylvania law, laches (Loretta's purported failure, in the eyes of the Florida court) will not salvage a "divorce" issued without jurisdiction, see *Loiacono v. Loiacono*, 179 Pa.Super. 387, 116 A.2d 881 (1952).

> "(J)urisdiction cannot be acquired or exercised by or pursuant to agreement between the parties. In a divorce action, jurisdiction cannot be assumed by decree *pro confesso*." *Phillips v. Phillips*, 146 Fla.311, 1 So.2d 186, 187 (Fla. 1941), cited and followed at *Kutner v. Kutner*, 33 So.2d 42, 43 (Fla. 1947) and more recently at *Fernandez v. Fernandez*, 632 So.2d 638, 640 (Fla. Dist. Ct. App. 2d, 1994)[12].

To the extent that a Pennsylvania court has, in this case, credited a Florida court under "Full Faith and Credit" with the power to issue a "Mexican divorce" (ie, to resurrect the previously voided jurisdiction of the Mexican courts back in 1967), then the Pennsylvania court has erred in applying the *U.S. Constitution*. Merely because the Florida court believed it had the power to "(ratify and affirm)" a divorce based on a "Mexican Divorce Decree" that was not in the record, this should not have completely foreclosed reexamination of the jurisdictional basis for the "Mexican divorce" by the Pennsylvania court applying its own law of the case, cf: *Williams*, supra. 325 U.S. at 234-235. Pennsylvania courts have misinterpreted the Florida decision, and attributed excessive jurisdiction (ie, that of a 1967-era Mexican forum) to the Florida courts.

In 1991 the Florida court had juris-

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[12] The law of Pennsylvania is similar, that jurisdiction cannot be conferred by consent or waiver on a court lacking jurisdiction:

> "(N)either by act of the parties nor by the act of this (Pennsylvania Supreme) Court can jurisdiction be conferred upon a court where jurisdiction is nonexistent." *In re Estate of Pozzuolo*, 433 Pa. 185, 249 A.2d 540, 545 (1969)

diction to apply Florida legal process to the Malleys, and to divorce them under any rationale that withstands the scrutiny of Due Process under Florida divorce law. But the 1991 Florida judgment has received from Pennsylvania courts a measure of currency far in excess of what is required under "Full Faith and Credit," in particular a measure of retroactive currency that is contrary to holdings at *Williams*, id. and at *Halvey* and *Lieb*, supra.

Pennsylvania has misinterpreted the Florida decision as, in effect, a *nunc pro tunc* 1967-vintage "Mexican divorce." If such a "divorce" ever issued at all in Juarez, it issued when both parties were citizens of and domiciled in Pennsylvania and not subject to Mexican jurisdiction (A-32, paras 1, 2). Any "Mexican divorce" was voided immediately, by operation of Pennsylvania law on September 7, 1967[13]. Ignoring the jurisdictional history that was settled in its own forum is the focus of error by the Pennsylvania court in applying "Full Faith and Credit."

The 1967 Determination of Jurisdiction Was "Res Judicata"

It is fundamental to jurisdiction that a final determination of a Court's subject matter jurisdiction is 'res judicata' to the litigants involved. *Durfee v. Duke*, 375 U.S. 106, 113 (1963)[14].

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[13] William challenged Loretta's actions, and ultimately appealed to the Pennsylvania Supreme Court; and he now argues that the results of his appeals should not be the law of the case.

[14] This is Pennsylvania law as well:

"(A) determination (of jurisdiction) is therefore the law of the case as to all jurisdictional objections which were actually

After Judge ALDISERT nullified jurisdiction of the Juarez, Mexico forum (A-32), and William failed to raise or preserve the issue[15] in the Pennsylvania appellate courts in appeals, 1968 thru 1970, the jurisdiction issue was settled as pertains to any "Mexican divorce." Under Pennsylvania law, consistent with *Duke*, supra, the issue of Mexican jurisdiction, which is critical to William raising any claim of "Mexican divorce" as a defense to the jurisdictional basis for entering APL judgments, should not have been revived in Pennsylvania proceedings. The matter was res judicata:

> "It is hornbook law that the final determination by a court of competent jurisdiction settles not only the defenses actually raised, **but also those which might have been raised**. (emphasis added). See *Jones v. Costlow*, 354 Pa. 245, 253-254, 47 A.2d 259, 263-264 (1946) and *Federal Land Bank of Baltimore v. Putnam*, 350 Pa. 533, 538, 39 A.2d 586, 588 (1944), cert. denied, 324 U.S. 882 (1944)." *Duquesne Light Company v. Pittsburgh Railways Company*, 413 Pa. 1, 194 A.2d 319, 321 (1963),

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raised or might have been raised...." *Drummond v. Drummond*, 414 Pa. 548, 200 A.2d 887, 888 (1964).

[15] William challenged the personal service on him, by the Sheriff, of the documents making up Loretta's actions. This was the basis for the opinion by Judge LEWIS at A-35-39. William did not challenge underlying Pennsylvania subject matter jurisdiction to enter the APL Order against him (see A-41

cert. denied 377 U.S. 924 (1964)[16].

The Pennsylvania Court's Grant of "Full Faith and Credit" Was Overly Broad

The effect of Pennsylvania granting "Full Faith and Credit" to the Florida judgment was to permit William to enter a "new" defense that was otherwise barred under state law, id[17]. The Pennsylvania court should have dovetailed the Florida decision into the pre-existing legal framework of the

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[16] Further to the issue of raising a "new" defense, the law in Pennsylvania was, and remains, that William could not have raised a defense of "illegality" after the initial rounds of litigation in the case:

> "The res judicata doctrine is designed to prevent the very situation which would result if appellant's second petition were granted, **namely, the injection of a new issue into the case after almost four years of litigation**. ... Pittsburgh Railways argues that an exception should be made to the application of the res judicata doctrine where the **defense of illegality** is involved. **We know of no such an exception nor make one here** (emphasis added)." *Pittsburgh Railways*, supra, 194 A.2d at 321.

In this Malley matter, instead of the *Pittsburgh Railways* "four years of litigation," we have over thirty (30) years of Pennsylvania litigation, and the resulting substantial monetary judgments of record against William Malley.

[17] William was granted by the court a procedural advantage in the case that would not have been available to him, per *Pittsburgh Railways*, id., if the case were controlled solely by the law of the case in Pennsylvania. The 1967 determination of lack of Mexican jurisdiction (A-32) should have governed the proceedings under "law of the case," see *Duke*, supra and *Christianson*, supra 486 U.S. at 415-416.

Pennsylvania law of the case, and given "Full Faith and Credit" for what the Florida decision actually stood for. The court could properly have held that the Malley marriage was terminated as of August 19, 1991 under Florida jurisdiction, and not retroactively to 1967 in Mexico when the Florida court had no jurisdiction over parties or subject matter.

The Pennsylvania court erred by reading a meaning into the Florida decision that the Florida court had no jurisdiction or power to issue[18]. The Pennsylvania court ignored the history of the case on its own docket, and rode roughshod over its previous holding in 1967 that settled the issue of jurisdiction between the parties. This was contrary to the law at *Duke*, supra.

Taking advantage of error by the Pennsylvania court, William entered a "new" defense that he was "divorced" under the 1967 Mexican proceeding. This "new" defense opened and undermined the validity of the APL arrearage judgments that Loretta obtained between 1967 and 1990, because under the law in 1967, APL terminated upon issuance of a divorce decree (A-15). This "new" defense by William constitutes a frontal assault, under the aegis of "Full Faith and Credit," on three decades of Pennsylvania legal process[19].

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[18] ie, that the Malleys were "divorced" in Mexico in 1967, as a result of a retroactive "ratification" in Florida in 1991.

[19] Without "Full Faith and Credit" to permit William to raise his "new" defense, the challenge to the long-standing APL arrearage judgments was entirely improper under quite venerable Pennsylvania law:

> "It is a settled rule that a judgment regular on its face and entered by a court of competent jurisdiction cannot, in the absence of fraud or

An Otherwise Void Act Cannot be "Ratified and Affirmed"

Respondent's argument in this case is built on the premise that the 1991 Florida court holding retroactively "ratified and affirmed" the 1967 "Mexican divorce." Respondent has argued that the 1991 Florida decision overrides any previous determination that Juarez lacked jurisdiction.

Respondent makes this argument despite the Pennsylvania law of the case (1967 to 1970) that was created due to his own legal challenge. That is, despite William's having litigated whatever issues he wished to raise in 1967 thru 1970, he now seeks procedural advantage as if his previous efforts never occurred, contrary to the holding at *Pittsburgh Railways*, supra. William wants the Pennsylvania courts to ignore their previous determination that Mexican courts lacked jurisdiction, and the decision that he was obliged to pay APL under a properly filed and served "Divorce From Bed and Board." It is as if "no jurisdiction" can be transformed into "jurisdiction" simply by saying it is so.

Under Respondent's line of reasoning, "Full Faith and Credit" to the 1991 Florida

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collusion, be impeached collaterally in any court by the parties or privies thereto, or by a stranger." *Bank v. Poore*, 231 Pa. 362, 366, 80 A. 525 (1911).

In Pennsylvania proceedings between 1967 and 1990, William never pled "fraud or collusion" at any stage of the proceedings; every APL judgment is "regular on its face;" and Loretta's actions against William for APL arrearages should have been entitled to a presumption of validity as a matter of law. Yet the extension of "Full Faith and Credit" to the Florida judgment gave William a "second bite at the apple," to challenge the validity of judgments and decades of settled Pennsylvania legal process.

decision essentially trumps the previously settled law of the case, citing *Treinies vs Sunshine Mining Co.*, 308 U.S. 66 (1939), a federal Interpleader action (predating *Williams*, *Estin* and *Duke*, supra) brought by a third party. Respondent has, in state court proceedings, raised the "last in time" rule to apply to conflicting determinations of jurisdiction coming out of courts of different states[20].

Treinies does not support the outcome in this case. In *Treinies* the Supreme Court of Idaho affirmed a lower court determination controlling the disposition of shares of stock in an Idaho mining company belonging to a deceased person whose will was probated in Washington. After losing the case over disposition of the Idaho property in the **Idaho** courts, Miss Treinies filed **a new, separate lawsuit** in state court in **Washington**, contending that the Idaho courts lacked jurisdiction to make the earlier decision against her. Sunshine Mining Co., the holder of the decedent's stock shares, interpled the matter to federal court seeking a decision as to who was entitled to the decedent's property.

Right away, there is a major difference between *Treinies* and the facts in this case: there is no "third party" interpleading in this case, to obtain a ruling on how to dispose of someone else's property. This case involves only two parties and a dispute over APL arrearages owed by one to the other. The "jurisdiction" issue of the "Mexican

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[20] *Duke* supra, held that a jurisdictional determination is res judicata; *Christianson* supra 486 U.S. at 817 held courts should be loathe to revisit prior decisions and alter law of the case absent some extraordinary circumstances such as clear error or manifest injustice, which the 1967 thru 1970 proceedings were not.

divorce" was settled in 1967 (A-32); and the propriety of Pennsylvania process underlying the APL Order was resolved in 1967 and on appeal, 1968 thru 1970 (A-34-41).

The jurisdictional element of the *Treinies* decision was its holding that "the procedure by which a state court examines into the question of the jurisdiction of a sister state is within the control of the respective states," id, 308 U.S. at 77, n. 21. That is, Pennsylvania courts had the power to review the procedure by which the Florida court established its own jurisdiction over William and Loretta Malley in 1991; but that is not the heart of the issue here. The question is whether the 1991 Florida court properly had power to decide, **for a second time**, the issue of Mexican jurisdiction, retroactive to 1967 and contrary to a previous decision exactly on point in Pennsylvania? The lower and appellate courts in Pennsylvania, 1994 thru 1998, ignored this issue.

The 1991 Florida court clearly noted the existence of Loretta's money judgments, but "ma(de) no ruling on the merits of any of those claims" (A-44). The Florida court was not making a *Treinies*-type of determination that, as of 1991 only Florida courts had jurisdiction over issues within the Malley marriage to the **exclusion** of Pennsylvania courts[21]. Obviously the Florida court was

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[21] Obviously, Loretta's Pennsylvania action was filed in 1967 and long predates William's 1991 Florida action. Judge ALDISERT, in 1967, made a jurisdictional determination (A-32) sufficient to void any Mexican "divorce" under the then-established Pennsylvania law at *DeRosay* and *Doughty*, supra; his jurisdictional ruling was the "law of the case" between the two parties. This case is not a situation, like in *Treinies*, of Loretta filing a "new" action in Pennsylvania after "losing" in Florida. Loretta was pursuing her rights under

acknowledging the existence of jurisdiction for Pennsylvania to review the validity APL judgments entered in its own courts. In fact this had already occurred during William's legal challenge between 1967 and 1970 (A-34-41). The validity of jurisdiction to enter the APL judgments had been previously upheld through appeal to the Pennsylvania Supreme Court[22]. The matter was *res judicata*.

Another point to consider is that the Florida court in 1991 made no *Treinies*-type of "examination into the question of the jurisdiction" of Mexico, which is obviously not a "sister state." The Florida court avoided the jurisdiction issue (an issue which is fundamental to divorce, *Williams*, supra.) by holding Loretta is "barred by the doctrine of latches (sic), estoppel, waiver, or a combination of either (sic) or all of them from challenging the validity of the Mexican Divorce Decree" (A-44), as if these doctrines can overcome a lack of jurisdiction over the parties (A-32, para 2). The Florida judgment is also a strange holding because the record is clear that, in 1967 and

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Pennsylvania law to collect proper judgments under her preexisting, 1967-vintage case. Loretta's case has been active continuously, and predates William's Florida divorce case by twenty-four (24) years.

[22] In other words, the 1991 Florida court conceded the obvious point that Pennsylvania courts have jurisdiction to review the APL judgments entered in Pennsylvania courts. However the Pennsylvania lower court in this case misapplied the Florida judgment, granting it an overly broad measure of "Full Faith and Credit." The Pennsylvania court viewed the Malleys as "divorced" in Mexico as of 1967 (A-15-17) notwithstanding the previous determination in 1967, by the same court (albeit a different Judge, A-32), of lack of jurisdiction in Mexico. Thus William could plead a "new" defense, **contrary to law of the case** under *Pittsburgh Railways*, supra. This "new" defense was key to William opening the APL judgments and undermining their validity.

afterwards, Loretta was never served with notice of the issuance of any "Mexican Divorce Decree," so how can "latches, etc." pertain? The first time William ever pled the issue of his "Mexican divorce" was during the 1991 Florida divorce proceedings; certainly not in the proceedings in Pennsylvania between 1967 and 1970.

Treinies should be read as a case supporting the argument that the 1991 Florida decision cannot revive a "Mexican divorce" action that had previously been adjudicated as void in Pennsylvania. "Void" should mean **void**: courts may have power to heal the sick but they should not use "Full Faith and Credit" doctrine to raise the dead. For this reason, the case merits review by the Supreme Court.

Conclusion and Summary of Reasons for Granting Review

We respectfully suggest that this Petition has significance beyond the personal interests of the parties involved. This case is not about a "divorce." This case is about the misapplication of constitutional doctrine by a state court, leading to a disregard of basic principles of jurisdiction and law of the case. At root, this is a case about civil procedure, highlighting fundamental issues governing court proceedings everywhere. Without basic protections and certitudes embodied in the doctrines of jurisdiction and law of the case, there is no law; only the whim and caprice of arbitrary power.

The uniqueness of this case is that it has been over thirty years in the making, with one foot in the 1960's; and another foot in this 1990's era of mobile society. Today people routinely move between states and nations and, equally commonly, take their disputes with them from court to court. Not

all disputes lend themselves to rapid resolution, and in consequence they can span many years and more than a single forum. Many courts, such as the Pennsylvania courts in this case, confront ambiguous and sometimes conflicting decisions from earlier proceedings in another state.

The U.S. Supreme Court receives many thousands of meritorious Petitions every year, but can grant review to only a small number. The Court has stated that it grants review only in cases that it believes are important to the national body of law. So we ask: How "important" to the nation was Miss Treinies and her stock in Sunshine Mining Co.? How "important" were Durfee and Duke, and their dispute over land along the Missouri River? How "important" were Sutton and Leib, or Mr. Williams and Mr. Halvey, and their respective disputes? Important enough to have established law in the Supreme Court that we are reviewing now, fifty and sixty years later. What is also important is that we have to review that law because the courts in Pennsylvania have misinterpreted it and erred. We are asking the Supreme Court to take one last look at this case and provide guidance on the important issues raised. **For the foregoing reasons, the Petition for Writ of Certiorari should be granted.**

Respectfully submitted:
Byron W. King, Esquire
Counsel of Record
and
Homer W. King
Attorneys for Loretta Malley

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February 11, 1999

SUPERIOR COURT OF PENNSYLVANIA
PITTSBURGH DISTRICT

Loretta R. Malley, Appellant	:	
	:	No. 1652
v.	:	Pittsburgh 1996
	:	
William L. Malley, Appellee	:	

J U D G M E N T

ON CONSIDERATION WHEREOF, it is now ordered and adjudged by this Court that the judgment of the Court of Common Pleas of Allegheny County be, and the same is hereby AFFIRMED.

BY THE COURT:
/s/ Eleanor R. Valecko
DEPUTY PROTHONOTARY
DATED: January 28, 1998

LORETTA R. MALLEY, : IN THE SUPERIOR COURT
Appellant : OF PENNSYLVANIA
:
v. :
:
WILLIAM L. MALLEY, :
Appellee : No. 01652
Pittsburgh 1996

Appeal from the Order
of the Court of Common Pleas
of Allegheny County,
Family Division
at No. FD89-6561,
Formerly
430 And 431 Oct. Term 1967 in Divorce.

BEFORE: TAMILIA POPOVICH and JOHNSON, JJ.

MEMORANDUM: FILED: January 28, 1998

The appellant, Loretta A. Malley, appeals the order of the Court of Common Pleas of Allegheny County confirming a foreign (Mexican) divorce decree recognized by a sister state (Florida) under the Full Faith and Credit Clause of the United States Constitution, Article IV, Section 1 on grounds, essentially, that: 1) the Florida court lacked jurisdiction to "ratify and affirm" the Mexican divorce decree of the appellee, William L. Malley; and 2) the record did not warrant the lower court's setting the appellee's alimony pendente lite arrears at zero dollars.

We have examined the parties' briefs, the record generated by this case and the law applicable to the dispute and conclude that the lower court's opinion responds adequately to the appellant's complaints. We, therefore, adopt it as our own and for

allocatur purposes.

Additionally, we would note that the question of <u>when</u> the parties were divorced (either the date of the Mexican decree on August 1, 1967, or a date thereafter) was a point of contention at the March, 1996 hearings. Thus, the issue was unsettled and an integral part of the lower court's disposition of August 9, 1996, appealed to this Court. See RR. 271a, 383a, 386a, 389a, 393a, 428a-429a. Consequently, unlike the appellee, we deem the matter preserved for review.

Order affirmed.

The Superior Court of Pennsylvania
Office of the Prothonotary
1015 Grant Building
Pittsburgh, Pennsylvania 15219

DAVID A. SZEWCZAK, ESQUIRE
Prothonotary

ELEANOR R. VALECKO
Deputy Prothonotary (412) 565-7592

March 26, 1998

Byron W. King, Esquire
601 Grant Street, Suite 240
Pittsburgh, PA. 15219

In re: Loretta R. Malley vs. William L. Malley, No. 1652 Pittsburgh 1996

Dear Mr. King:

The Court has entered the following Order on the Application for Reargument or Reconsideration in the above-captioned matter:

"ORDER OF COURT

The Court hereby DENIES the application filed February 10, 1998 requesting reargument or reconsideration of the decision dated January 28, 1998.
Date: March 26, 1998 PER CURIAM"

Very truly yours,
/s/ Eleanor R. Valecko
DEPUTY PROTHONOTARY

ERv/ejf
cc: Brian C. Vertz, Esquire
The Honorable Ronald W. Folino

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

LORETTA R. MALLEY, Plaintiff,	FAMILY DIVISION No. FD89-6561
vs.	
WILLIAM L. MALLEY, Defendant.	

ORDER OF COURT

AND NOW, this 11th day of July, 1996, after consideration of Plaintiff Loretta Malley's "Petition for Declaratory Judgment" and "Petition to Enforce Accrued Arrearages on Order of Alimony Pendente Lite, Counsel Fees and Expenses" and on Defendant William L. Malley's "Petition to Terminate Alimony Pendente Lite and to Correct Judgments on Arrearages" it is hereby ORDERED, ADJUDGED and DECREED as follows:

1. Plaintiff Loretta Malley's Petition to Enforce Accrued Arrearages and Petition for Declaratory Judgment are dismissed.

2. Defendant William L. Malley's Petition to Terminate Alimony Pendente Lite and to Correct Judgments on arrearages is granted, alimony pendente lite is terminated, the arrearage judgments are satisfied and arrears are set at zero dollars ($0).

BY THE COURT:
/s/ R.W. Folino, J.

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

LORETTA R. MALLEY,	)	FAMILY DIVISION
	)	
Plaintiff,	)	No. FD89-6561
	)	Superior Court
vs.	)	1652PGH96
	)	
WILLIAM L. MALLEY,	)	
	)	
Defendant.	)	

OPINION

FOLINO, J.

This case concerns the legal effect upon this court of a Florida Final Judgment, entered after full hearing and affirmed on appeal, which ratified and adjudged to be valid a 1967 Mexican Divorce Decree.

The case came before this court in the form of two petitions filed by Plaintiff, Loretta R. Malley ("Former Wife"): (1) Petition for Declaratory Judgment Regarding Marital Status and (2) Petition to Enforce Accrued Arrearages on Order of Alimony Pendente Lite. In her petitions, Former Wife requested this court to reject the Florida Final Judgment, to find the Mexican Divorce Decree to be invalid, and to enforce strictly an alimony pendente lite order which had been entered by the Court of Common Pleas of Allegheny County in 1967 (and which Wife argued continued to accrue

arrearages over the last 29 years to the present day). Defendant, William L. Malley ("Husband"), filed an Answer and New Matter to Former Wife's petitions and also filed a petition of his own, namely, a Petition to Terminate Alimony Pendente Lite and to Correct Judgments on Arrearages.

After hearing, by order dated July 11, 1996, this court dismissed Former Wife's petitions, granted Husband's petition, and set arrearages at zero. Thereafter, upon review of Former Wife's post-trial motion for reconsideration, I reaffirmed my order. Wife now appeals.

FACTUAL AND PROCEDURAL HISTORY

William L. Malley is 80 years old; Loretta Malley is 81. The parties were married November 26, 1942. They first separated in 1964, and, after some failed reconciliations, finally separated in 1965. At the time of separation the parties had three children: John, age 19, Peter, age 17 and Lisa, age 15.

Approximately two years after separation, and after unsuccessful attempts to obtain a divorce in Pennsylvania, Husband (through his lawyer) made arrangements to travel to Juarez, Mexico in May of 1967, and, on August 3, 1967 obtained the Mexican Divorce Decree.

After the Mexican Divorce Decree was rendered and Husband received his copy in the mail, Husband resigned his position in Pittsburgh and moved to Florida. In Florida, Husband was joined by Mary Ann Malley. They took the divorce decree to a Florida judge who directed that a marriage

license be issued. On September 28, 1967, Husband and Mary Ann Malley ("Current Wife") were married. Two children were born to them during the marriage, Michelle and Patrick, both now adults. Husband and Current Wife remain married to this day (more than 29 years) and continue to reside together in Florida.

Back in 1967, however, after Husband filed his Mexican Divorce action, Former Wife filed a Divorce Complaint in Pennsylvania and filed for alimony pendente lite. Former Wife considered her action to be a countersuit to counteract his Mexican Divorce. (Trial before the Honorable John Phillips and the Fifteenth Judicial Circuit Court in and for Palm Bach County, Florida, July 2, 1991, (hereinafter "Fla. Tr." Vol. I at 166, 167).

Approximately one month after Husband obtained the Mexican Divorce, Former Wife presented a Motion for Preliminary Injunction before the Court of Common Pleas of Allegheny County. Husband did not appear at this proceeding. Thus, on September 7, 1967, said court issued an order which "enjoined and restrained Husband from proceeding with the divorce action in Mexico" and "enjoined and restrained [him] from instituting or proceeding with any divorce proceeding in any jurisdiction other than the County of Allegheny County, Commonwealth of Pennsylvania." By separate order that same day (September 7, 1967), the Court of Common Pleas of Allegheny County also ordered Husband to pay Former Wife alimony pendente lite in the sum of $1,300.00 per

month. Of course as the above chronology reflects, these orders were entered after Husband had already traveled to Mexico and obtained the divorce decree.

On March 15, 1968, on Former Wife's petition, a rule was entered to show cause why judgment should not be entered against Husband in the amount of $8,163.25 for APL arrearages. Husband responded by challenging the service of process that had been made upon him in the divorce and equity suits (specifically, service of process dated August 10, 1967). Said service of process was upheld by the trial court (opinion by Lewis, J.). Judge Lewis concluded that Husband had delayed several months in raising questions to the defective service and had made some APL payments to Wife. Therefore, Judge Lewis determined that "Defendant has waived any defects there might be in the service[.]" The Superior Court affirmed per curiam. Allocatur to the Supreme Court of Pennsylvania was denied on August 4, 1970.

Thereafter, on eight occasions between September 1970 through August 28, 1990, Former Wife's counsel periodically entered judgments against Husband on the accrued APL arrearages in Allegheny County. Said judgments are as follows:

04/08/68	$ 8,163.25
09/22/70	20,400.00
11/03/71	9,800.00
12/11/72	9,492.00
09/18/74	13,448.00
12/26/79	42,797.00
01/31/84	33,884.68
08/29/90	104,128.43
TOTAL	$ 242,113.36

Husband credibly testified that, with respect to most of these judgments, he was unaware of their being entered against him until after the fact.

Husband had been making payments to Former Wife (and on her behalf) since the parties separated in 1965 (that is, even before the subject APL order was entered). After the entry of the 1967 APL order, Husband continued to make payments for approximately 20 more years, through 1987. Husband made cash payments directly to former Wife through 1985. In addition, Husband paid all real estate taxes and water and sewage services on the Fox Chapel marital residence through 1987. Husband paid all mortgage payments on the marital residence until the mortgage loan was paid in full. Husband then conveyed to Former Wife the Fox Chapel residence (including all furniture and fixtures). Husband conveyed to Former Wife the entire investment portfolio of stocks that the parties accumulated during their marriage. Even before the investment portfolio was transferred to Former Wife, Former Wife received all dividends which accrued on said portfolio. In addition, through a sheriff's sale, Former Wife received all proceeds from the sale of a Morningside residence inherited by Husband from his mother. Former Wife also received all proceeds from the sale of Husband's country club membership and received an automobile. (Husband also made payments to Former Wife for child support, medical expenses and payments for private school and college tuition, but those payments are not relevant to this case as Husband

is not claiming APL credit for said payments). In short, Husband has transferred to Former Wife virtually 100% of the marital estate and has made cash payments to her (or on her behalf) for approximately 20 years after separation. Former Wife was left with no liabilities at the time of separation. When Husband moved to Florida in 1967, he took with him his car, $400.00 in cash and his clothing and personal things.

In connection with the APL judgments, Former Wife sometimes acknowledged on the record and gave Husband credit for, some of these payments to her. The testimony before this court was quite clear, however, that Husband was never credited with many payments, including the largest transfers such as the Fox Chapel residence and the investment portfolio.

In approximately July of 1989, Husband learned that a hearing date had been set for the entry of one of the APL judgments in Allegheny County, Pennsylvania. This was new to Husband because, in prior years, he generally learned about the entry of the judgments against him after the fact. After speaking with Florida counsel about issues related to these judgments, Husband apparently became concerned that a court might declare the Mexican Divorce Decree to be invalid.

Accordingly, Husband filed in the Fifteenth Judicial Circuit Court in Florida a petition in which he sought, inter alia, to have the validity of the Mexican Divorce Decree adjudicated. Former Wife filed a counter petition in

the Florida action seeking equitable distribution, alimony, attorney's fees, suit money and other relief.

Said Florida case was tried on July 2 and July 3, 1991. Both parties testified and were represented by counsel. One of the primary issues litigated in that case was the validity of the Mexican Divorce Decree (see Former Wife's counsel's closing argument at Fla. Tr., Vol. II, 60, line 22). Former Wife's counsel argued that the Mexican Divorce was invalid under both Pennsylvania and Florida law. (Fla. Tr., Vol. II, 64). In the Florida action, Former Wife advanced virtually the same legal arguments that she is advancing before this court regarding the validity of the Mexican Divorce Decree.

After full hearing, the Circuit Court of the Fifteenth Judicial Circuit of Florida entered, in relevant part, the following order:

> The Court further finds that both parties have ample funds from which to pay an attorney for the litigation that has just concluded, and each is equally capable of carrying his or her own attorney's fees, suit money and costs in this litigation.
>
> It is thereupon ORDERED AND ADJUDGED:
>
> 1. The Mexican Divorce Decree rendered August 1, 1967 is adjudged to be valid and the Court ratifies and affirms said Mexican Divorce Decree.

The aforesaid Florid judgment dated August 19, 1991 was affirmed by the Florida Court of Appeals in a reported decision. *Malley v. Malley*, 603 So.2d 4 (Fla. App. 1992), affirmed on rehearing, 17 Fla. L.W. D2045 (1992).

After resolution of the Florida case, Former Wife filed with this court the two petitions which are the subject matter of this opinion. In her petitions, Former Wife requested this court to find, inter alia, that the Mexican Divorce was fatally defective ab initio. She requested this court to refuse to recognize or be bound by the Florida court final judgment. Wife also argued that this court should find that the APL order from 1967 remains in full force and effect. Accordingly, Former Wife's monetary demand at trial for APL judgments previously entered, plus APL running to date of trial, plus interest, plus costs and counsel fees, was $735,744.30.

As stated above, Husband filed an Answer and New Matter raising affirmative defenses to Wife's petitions and also filed a Petition to Terminate Alimony Pendente Lite and to Correct Judgment on Arrearages.

By consent order, this court consolidated these matters for disposition. After conciliation, and at the urging of counsel that much of the case could be resolved through the submission of briefs by counsel and review of the record by the court, I ordered the parties to submit briefs and proposed findings.

Thereafter, I entered an order dated

September 25, 1995 granting full faith and credit to the Florida Final Judgment dated August 19, 1991.[1] Pursuant to the Full Faith and Credit Clause of the U.S. Constitution, the judgment of a sister state is entitled to the same res judicata effect as it would have in the rendering state. *U.S. Const.* Art. 4 § 1; 28 U.S.C. § 1738; 23 Pa.C.S. §3333; *Williams v. No. Carolina*, 325 U.S. 226, 65 S.Ct. 1092, 89 L.Ed. 1577 (1945); *Barnes v. Buck*, 464 Pa. 357, 346 A.2d 778 (1995).

However, because the Florida Final Judgment did not adjudicate the claims contained in Former Wife's Petition to Enforce Accrued Arrearages, and because resolution of at least some of those claims appeared to require a determination of disputed facts (for example, whether Husband received full credit for APL payments previously made), I further ordered an evidentiary hearing to address any factual issues in the parties' petitions.

After hearing, by order dated July 11, 1996, I dismissed Wife's petitions, granted Husband petition and set arrearages at zero. After review of Wife's Post-Trial Motion for Reconsideration, I reaffirmed my order of July 11, 1996, by order dated August 9, 1996. As indicated above, Wife appeals that order.

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[1] No appeal was taken from this court's September 25, 1995 order.

DISCUSSION

The Legal Effect of the Florida Judgment

In its simplest terms, the first issue is when, if ever, the parties' status as husband and wife was effectively dissolved. If the parties' marriage was dissolved in 1967, as Husband contends, then the subsequent Pennsylvania arrearage judgments must be held to be invalid, because the Pennsylvania law prior to the Divorce Code of 1980 did not provide for post-divorce alimony pendente lite or alimony. If, on the other hand, the parties' marriage has not yet been dissolved, as Former Wife contends, then the judgments are valid and alimony pendente lite continues to run to this day.

As noted above, I previously determined that this court shall give full faith and credit to the Florida Final Judgment. The Florida Judgment specifically states that "[T]he Mexican Divorce Decree is Adjudged to be valid." Thus, the plain meaning of the Florida Judgment is that the Mexican Divorce Decree is valid and has been so ab initio. No other date for the validity is suggested by the terms of the Florida judgment or the context of the case. For example, the Florida Judgment does not say that the parties are deemed to be divorced from this day forward, or that the Mexican Divorce Decree is effective hereinafter. Rather, the Florida Court simply adjudged that the 1967 divorce decree was valid. The common sense meaning of those words is that the divorce decree is valid from its inception--1967.

Such an interpretation is also

consistent with the context of the case. Florida law provides that a judgment should be given the interpretation that will render it reasonable, effective and conclusive. *Boynton v. Canal Authority*, 311 So. 2d 412 (Fla. App. 1975). The Florida trial court opinion reveals that Former Wife was aware of Husband's remarriage to Mary Ann Malley in 1967 and did not challenge the marriage for more than twenty years. By determining that the divorce decree was valid from its inception, the Florida court could thereby preserve Husband's second family, protect his children from illegitimacy and avoid future litigation over Husband's estate by barring Former Wife from challenging the remarriage.

Thus, it is clear that the only proper and reasonable interpretation of the Florida Final Judgment is that the Mexican Divorce Decree was valid from its inception in 1967. (It is worth noting that Former Wife does not contend that some other date for validity should be used. Rather, Former Wife argues simply that the decree was never valid and remains invalid today.)

It is settled law that a spouse's obligation to pay alimony pendente lite terminates upon entry of a divorce decree, unless a dependent spouse pursues an appeal from the decree. *Heilbron v. Heilbron*, 158, Pa. 297, 27 A. 967 (1893); *Co. v. Scholl*, 156 Pa. Super 136, 39 A.2d 719 (1945). Under the Pennsylvania Divorce Law of 1929 (predecessor of the Divorce Code of 1980) and pre-code case law, there was no permanent alimony or

equitable distribution of marital property after the entry of a divorce decree. 23 P.S. § 10 et seq. (repealed April 2, 1980, effective July 1, 1980); *Stambaugh v. Stambaugh*, 458 Pa. 1297, 329 A.2d 483 (1974); *Hooks v. Hooks*, 187 Pa. Super. 507, 187 A. 245 (1936).

Accordingly, because Husband and Former Wife were divorced on August 1, 1967, and no appeal was taken from that decree, no alimony pendente lite obligation could have properly existed after that date. For that reason, I dismissed Former Wife's petitions and granted Husband's petition. Such a determination is not only required by proper application of the law, but, as set forth in the following section, is entirely fair under the facts of this long and unhappy case.

Credits for Direct Payments toward Alimony Pendente Lite

Assuming arguendo that a valid APL obligation existed after the entry of the Mexican Divorce Decree, the issue then becomes: has Husband received proper credit for direct payments he has made toward APL? The answer to that question is clearly "no." Although counsel for Former Wife argued that Former Wife has given Husband credit for every payment Husband has made toward APL, that clearly is not the case. Rather, Former Wife has given Husband credit only for those payments which Former Wife and her counsel have deemed appropriate for credit.

A review of the court papers filed by Former Wife in connection with the eight

APL judgments she has entered against Husband reveals that Former Wife sometimes specified the amount of and reason for the credit given, and sometimes did not. For example, the first (April 8, 1968) judgment reflects a credit given for five direct payments of $716.00 and two direct payments of $616.00. The second and third judgments doe not specify any credits. The fourth judgment specifies credits for direct payments ($3,900.00), real estate taxes ($2,000.00) and mortgage payments ($1,508.00). The fifth judgment reflects credits for direct payments ($6,600.00), real estate taxes ($4,000.00), mortgage payments ($2,552.00) and miscellaneous household payments ($2,000.00). The sixth judgment reflects credits for direct payments ($20,000.00), real estate taxes ($11,400.00) and house maintenance ($3,803.00). The seventh and final judgment was entered by order dated September 13, 1990. This order reflects that said judgment was entered after hearing and that, although Husband was not present, he was represented by counsel. Thus, unlike the prior judgments, the eighth judgment afforded Husband the opportunity, through his counsel, to request appropriate credits at the time of entry of the judgment. No credits are specified in the court papers however, with respect to this judgment.

At any rate, the face amount of the judgments totaled $242,113.36. Counsel for Former Wife apparently now acknowledges that Former Wife has not given Husband credit in these judgments for all direct payments. For example,

counsel for Former Wife conceded at trial that Husband was never given credit for the single largest transfer to Former Wife in this case, the Fox Chapel marital residence. Counsel for Former Wife testified that no credit was given Husband for this transfer because counsel never agreed with Husband as to the appropriate value of the property. The fair market value of the property at the time of trial was at least $240,000.00, making Husband's credit at least $120,000.00.

In addition, the evidence is clear that Wife received all dividends from the parties' entire investment portfolio after separation, yet Husband never received any credit. It is also undisputed that Husband transferred the parties' entire investment portfolio itself to Former Wife; Husband never received credit for this transfer. Also, the proceeds of the sale of Husband's mother's former residence were transferred to Former Wife; Husband received no credit. Various miscellaneous items such as an automobile, household goods, jewelry and the proceeds from the sale of a country club bond were transferred to Former Wife without credit to Husband. The value of these items alone exceeds the face amount of the eight APL judgments in this case. Husband argues in addition that he has not received credit for many other regular direct payments that he made to Former Wife over the years. There is really no way to know whether Husband has been properly credited for these regular payments. The parties' memories have long ago faded and the court papers tell only part of the story.

However, simply by giving Husband proper credit for those payments which clearly have been uncredited to date, the face amount of the judgments should be marked satisfied. Of course, Former Wife argues that the face amount of the judgments is only part of the monetary award to which she is entitled. Wife argues that seven of the APL judgments were revived on or about August 26, 1991 (after the Florida trial) to reflect substantial accrued interest. The answer to this argument, however, is that if Husband had been properly credited with his direct payments, the interest calculated by Former Wife would not have accrued.

CONCLUSION

This case demonstrates some of thorny procedural issues that can arise in Pre-Divorce Code cases. It is hornbook law that "an alimony pendente lite obligation exists only during the pendency of a divorce proceeding to enable a dependent spouse to prosecute or defend the action." Wilder, *Pa. Family Law Prac. and Proc.* (3rd ed.) §5-4 (emphasis added). Yet, in this case, Husband has made alimony pendente lite payments for more than 20 years after the entry of a divorce decree, through 1987. Former Wife argues that Husband should still be paying APL today. Unfortunately, the concepts of alimony and equitable distribution were not available to the parties in this Pre-Divorce Code case. Nevertheless, although the case is a bit of a tangle from a procedural point of view, this court is entirely satisfied

that the result ultimately reached is both proper legally and fair in equity. From a legal view point, the case is straightforward: APL is not payable after entry of a divorce decree; a divorce decree was entered in 1967; the validity of the divorce decree was litigated by the parties and the decree was held to be valid by the judgment of a sister state; this court gave full faith and credit to that sister state's judgment. Thus, although Husband's legal obligation to make APL payments to Former Wife ceased in 1967, he continued to make direct payments and to transfer property to her through 1987. Although Husband perhaps has a theoretical argument for reimbursement of APL paid after the entry of a divorce decree, he did not make such a request for reimbursement at trial, nor would I have granted such a request. It is clear under the law, however, that Wife's request that APL continue to be paid in full after the entry of the divorce decree and into the future should be denied.

Fortunately, application of the pre-code law results in economic justice to the parties in this case. Former Wife has received virtually 100% of the marital estate; Husband made payments in the nature of APL and alimony for 22 years after separation.

These parties have now been separated for nearly 32 years. They have been divorced for 29 years. It is time for them to stop litigating their divorce.

This court's order of August 9, 1996 should be affirmed.

DATE FILED March 27, 1997

IN THE COURT OF COMMON PLEAS
OF ALLEGHENY COUNTY, PENNSYLVANIA

LORETTA R. MALLEY,	)	FAMILY DIVISION
	)	
Plaintiff,	)	No. FD89-6561
	)	
vs.	)	
	)	
WILLIAM L. MALLEY,	)	ORDER OF COURT
		)
Defendant.		)

ORDER OF COURT

AND NOW, this 25th day of September, 1995, upon consideration of Plaintiff Loretta R. Malley's Petition for Declaratory Judgment and Petition for Accrued Arrearages, and Defendant William L. Malley's Petition to Terminate Alimony Pendente Lite and to Correct Judgments on Arrearages, this court finds as follows:

1) Pursuant to the "Necessary Divorce Action" filed by Defendant William L. Malley, M.D., on June 1, 1967 in Juarez, Mexico, a Mexican Divorce Decree (hereinafter referred to as the "Mexican Divorce Decree") was entered on August 1, 1967.

2) On August 20, 1990, Defendant William L. Malley, M.D., filed a Petition for Dissolution of Marriage at No. 90-8853 in the Circuit Court of the Fifteenth Judicial Circuit of Florida in and for Palm Beach County (hereinafter referred to as the "Florida Divorce Action").

3) Plaintiff Loretta A. Malley filed an Answer and Counter-Petition for

Dissolution of Marriage in the Florida Divorce Action, raising claims for equitable distribution of marital property, partition of personal property, permanent and/or periodic alimony, and counsel fees, costs and expenses.

4) Plaintiff Loretta A. Malley appeared generally in the Florida Divorce Action and offered testimony, exhibits and argument during the two day trial on July 2 and 3, 1991.

5) The pleadings and transcript from the Florida Divorce Action indicate that Plaintiff Loretta A. Malley offered testimony and argument specifically contesting Defendant William L. Malley, M.D.'s domicile and domiciliary intent in obtaining the Mexican Divorce Decree.

6) On August 19, 1991, the Circuit Court of the Fifteenth Judicial Circuit of Florida in and for Palm Beach County entered a Final Judgment, which provided as follows:

> THIS MATTER came on and for trial July 2 and July 3, 1991, upon the "Husband's" Petition for Dissolution of Marriage, in which he sought, inter alia, to ratify and affirm a Mexican Divorce Decree rendered August 1, 1967. The "Wife" filed a Counter-Petition for Dissolution of Marriage seeking equitable distribution, permanent periodic alimony, attorney's fees, suit money and other relief. The "Husband" filed an Answer to the Counter-Petition and alleged the affirmative defense of estoppel based

upon her conduct and based upon the fact that she has held herself out to be a single person. The "Husband" was present, testified and represented by Peggy Rowe-Linn, Esquire. The "Wife" was present, testified and represented by Lewis Kapner, Esquire. The court after hearing the testimony of the parties, their witnesses, considering the documentary evidence, argument of counsel an being otherwise full advised in the premises finds that the "Wife," LORETTA MALLEY is barred by the doctrine of latches, estoppel, waiver, or a combination of either or all of them from challenging the validity of the Mexican Divorce Decree. The court further finds that the "Wife," LORETTA MALLEY, filed an action to domesticate a foreign judgment, to set aside fraudulent conveyances and other matters in this action. The Court struck those causes of action in this case and makes no ruling on the merits of any of those claims. The Court further finds that both parties have ample funds from which to pay an attorney for the litigation that has just concluded, and each is equally capable of carrying his or her own attorney's fees, suit money and costs in this litigation.

It is thereupon ORDERED AND ADJUDGED:

1. The Mexican Divorce Decree

rendered August 1, 1967 is adjudged to be valid and the Court ratifies and affirms said Mexican Divorce Decree.

2. The "Husband's" Count for Dissolution of Marriage is denied as moot and therefore neither party is entitled to financial relief thereunder.

3. The "Wife's" Counter-Petition for Dissolution of Marriage is denied as moot and therefore neither party is entitled to financial relief thereunder.

4. The parties' claims for attorney's fees, suit money and costs is denied.

DONE AND ORDERED this 19 day of Aug., 1991 at West Palm Beach, Florida.

/s/ John L. Phillips
Circuit Court Judge

7) On September 2, 1992, the Florida Court of Appeals in a published decision on rehearing affirmed the Florida Final Judgment dated August 19, 1991. *Malley v. Malley*, 603 So.2d 4 (1992).

8) On August 11, 1994, Plaintiff Loretta A. Malley presented her Motion to Obtain a Hearing Date on Petition to Enforce Accrued Arrearages on Order of Alimony Pendente Lite, Counsel Fees and Expenses, at No. FD89-06561 in the Court

of Common Pleas of Allegheny County, Pennsylvania, Family Division.

9) On August 19, 1994, Plaintiff Loretta A. Malley presented her Motion to Obtain Hearing Date on Petition for Declaratory Judgment Regarding Marital Status, at No. FD89-06561 in the Court of Common Pleas of Allegheny County, Pennsylvania, Family Division.

10) On November 21, 1994, this court entered an Order of Court consolidating Plaintiff Loretta A. Malley's Petition to Enforce Accrued Arrearages and Petition for Declaratory Judgment Regarding Marital Status.

11) In Plaintiff's consolidated Petitions, Plaintiff Loretta A. Malley requested, inter alia, that this court ratify and enforce prior judgments on alimony pendente lite arrearages entered at Nos. 430 and 431 October Term 1967 and/or No. FD89-06561, in the Court of Common Pleas of Allegheny County, Pennsylvania, Family Division, in favor of Plaintiff Loretta A. Malley and against Defendant William L. Malley, M.D., as follows:

04/08/68	$ 8,163.25
09/22/70	20,400.00
11/03/71	9,800.00
12/11/72	9,492.00
09/18/74	13,448.00
12/26/79	42,797.00
01/31/84	33,884.68
08/29/90	104,128.43
TOTAL	$ 242,113.36

12) In Plaintiff's consolidated Petitions, Plaintiff Loretta A. Malley

further requested that this court enter judgment on alimony pendente lite arrearages accruing from August 29, 1990 to August, 1994, in the amount of $69,426.50, plus counsel fees and expenses in the amount of $112,530.25.

13) On December 20, 1994, Defendant William L. Malley, M.D., filed an Answer and New Matter to Plaintiff's consolidated Petitions, raising the affirmative defenses of res judicata, laches/estoppel and payment in full/satisfaction.

14) On January 18, 1995, Defendant William L. Malley, M.D., filed an Amended Answer and New Matter to Plaintiff's consolidated Petitions, incorporating the affirmative defenses raised in the Answer and New Matter.

15) In support of his affirmative defense of res judicata set forth in New Matter, Defendant William L. Malley, M.D., filed in Allegheny County, Pennsylvania, a certified copy of the Final Judgment dated August 19, 1991, entered by the Circuit Court of the Fifteenth Judicial Circuit of Florida in and for Palm Beach County, at No. 90-8853.

16) In support of his affirmative defense of payment in full in New Matter, Defendant William L. Malley, M.D., pleaded that he paid more than $750,000.00 in the nature of alimony pendente lite to, for and on behalf of Plaintiff Loretta A. Malley from 1967 to the present, including $518,491.00 in cash, investment securities and direct payments towards a mortgage loan and real estate taxes on Plaintiff's behalf, and conveyance of a Fox Chapel residence to Wife appraised at $240,000.00

in 1990.

17) On April 13, 1995, Defendant William L. Malley, M.D., presented his Petition to Terminate Alimony Pendente Lite and to Correct Judgments on Arrearages, pursuant to the Pennsylvania Rules of Civil Procedure, Rule 1910.23-2.

NOW THEREFORE, pursuant to the Full Faith and Credit Clause of the U.S. Constitution, wherein the judgment of a sister state is entitled to the same res judicata effect as it would have in the rendering state, *U.S. Const.* Art. 4, § 1; 28 U.S.C. §1738; 23 Pa.C.S. § 3333; *Williams v. No. Carolina*, 325 U.S. 226, 65 S.Ct. 1092, 89 L.Ed. 1577 (1945); *Barnes v. Buck*, 464 Pa. 357, 346 A.2d 778 (1975), that the doctrine of res judicata bars relitigation of all issues that were actually raised or might have been raised in the prior adjudication, *Coleman v. Coleman*, 361 Pa. Super. 446, 522 A.2d 1115 (1987), that the judgment of a sister state is a conclusive adjudication of everything involved therein except the jurisdictional facts upon which it is founded, and that the jurisdiction of the Florida court to render its decision is not contested: It is hereby ORDERED, ADJUDGED and DECREED that this court grants full faith and credit to the Florida Final Judgment dated August 19, 1991, validating, ratifying and affirming the Mexican Divorce Decree.

This court FURTHER FINDS that the Florida decree failed to adjudicate the claims contained within Plaintiff Loretta A. Malley' Petition to Enforce Accrued Arrearages on Order of Alimony Pendente

Lite, Counsel Fees and Expenses and, therefore, it is FURTHER ORDERED that a two day evidentiary hearing shall be scheduled for the 26th & 27th days of March, 1995 at 9:30 A.M., 704 City-County Building, Pittsburgh, Pennsylvania, to determine, inter alia, Plaintiff Loretta A. Malley's claims of waiver, laches, estoppel and res judicata, in support of her Petition to Enforce Arrearages, as well as Defendant William L. Malley, M.D.'s claims/defenses, i.e., res judicata, laches/estoppel and payment in full/satisfaction in opposition thereto and in support of his Petition to Terminate Alimony Pendente Lite and to Correct Judgments on Arrearages, and all other matters raised by the parties in their pleadings.

BY THE COURT:
/s/ R. W. Folino, J.

IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

LORETTA R. MALLEY, Petitioner	No. 250 Western District Allocatur Docket
v.	1998
WILLIAM L. MALLEY, Respondent	Petition for Allowance of Appeal from Order of the Superior Court

ORDER

PER CURIAM

AND NOW, this 8th day of October, 1998, the Petition for Allowance of appeal is hereby DENIED.

IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

LORETTA R. MALLEY, Petitioner	No. 250 Western District Allocatur Docket
v.	1998
WILLIAM L. MALLEY, Respondent	Application for Reconsideration of Petition for Allowance of Appeal

ORDER

PER CURIAM

AND NOW, this 16th day of November, 1998, the Petition for Reconsideration of Petition for Allowance of appeal is hereby DENIED.

IN THE COURT OF COMMON PLEAS
OF ALLEGHENY COUNTY, PENNSYLVANIA

LORETTA R. MALLEY, Plaintiff,	)	No. 430
	)	October Term 1967
vs	)	In Equity
WILLIAM L. MALLEY, Defendant.	)	

ORDER OF COURT FOR
PRELIMINARY INJUNCTION

And now, to-wit, this 7th day of September, 1967, it being the time and place for hearing on the within Equity Action, and Plaintiff's Motion for Preliminary Injunction being properly made, notice of which having been properly given Dr. William Lee Malley by personal service, upon consideration of the Complaint made and filed and testimony taken, on motion of Homer W. King, Esq., Counsel for Plaintiff, it is hereby ordered, adjudged and decreed:

1. That Plaintiff and Defendant are both residents and/or domiciled in the County of Allegheny, Commonwealth of Pennsylvania, and this Court has jurisdiction.

2. That no other Court in any state or county has jurisdiction over the parties hereto.

3. That a Complaint in Equity and Motion for Preliminary Injunction thereon was properly filed and served upon the Defendant Dr. William Lee Malley en persona.

4. That Dr. William Lee Malley be and is herewith enjoined from proceeding with the divorce action he instituted in the Civil Court of Ciudad Juarez, Chihuahua, Mexico, and that the said Dr. William Lee Malley be further enjoined from causing any attorney, agent, servant or employee to do anything whatsoever in furtherance of said action, and that the said Dr. Malley is further enjoined and restrained from instituting or proceeding with any divorce proceeding in any jurisdiction other than the County of Allegheny, Commonwealth of Pennsylvania.

5. The said Dr. William Lee Malley, Defendant, be and to remain enjoined from pursuing the aforesaid action or actions until further Order of Court.

6. The Plaintiff shall post bond in the sum of $50.00 to cover costs.

//s// R.J.ALDISERT, J.

IN THE COURT OF COMMON PLEAS
OF ALLEGHENY COUNTY, PENNSYLVANIA

LORETTA R. MALLEY,)
Plaintiff,)No.431 October Term 1967
)
vs.)
)
WILLIAM L. MALLEY,)
Defendant.)

ORDER OF COURT

And now, to-wit, this 7th day of September, 1967, the within petition being presented in open court, and upon consideration thereof, it is hereby ordered, adjudged and decreed that the defendant William L. Malley pay to the plaintiff Loretta R. Malley the sum of $1,300.00 per month as Alimony Pendente Lite, and further to pay to the said Loretta R. Malley on account of counsel fees the sum of $3,500.00 plus expenses of $233.70.

By the Court:
//s// R.J.ALDISERT, J.

IN THE COURT OF COMMON PLEAS
OF ALLEGHENY COUNTY, PENNSYLVANIA
CIVIL DIVISION

LORETTA R. MALLEY)
)
vs.) NO.431 OCTOBER TERM, 1967
)
WILLIAM L. MALLEY) BEFORE: Lewis and
McLean, JJ.

O P I N I O N

Lewis, J.

This matter comes before the Court en banc on a reargument granted by the Assignment Room Judge, who heard the argument on the plaintiff's preliminary objections to a rule granted on the plaintiff to show cause why the service on the defendant in the above entitled case should not be quashed. The Court dismissed the plaintiff's preliminary objections and ordered that a deposition be taken of the deputy sheriff who signed the return of service.

The matter involves a divorce proceeding in which the defendant specially appeared to contest the jurisdiction of the Court on the ground that the defendant was not personally served. The return by the deputy sheriff states:

> "On 8/10/67 at 2 P.M. (a deputy sheriff) served the within named defendant, William L. Malley, at West Penn Hospital, 4800 Friendship Ave., Pgh., Pennsylvania, by handing to him personally a true and attested copy of the within Notice of Suit together with a copy of the Complaint and Petition, making know- to him the contents

thereof."

The plaintiff contends that the return of the sheriff was full and complete on its face and therefore immune from attack by extrinsic evidence.

It is true that it has long been held in Pennsylvania that, in the absence of fraud, the return of service of a sheriff, which is full and complete on its face is conclusive and immune from attack by extrinsic evidence. *Kane v. Travis*, 172 Pa Superior Ct. 220. However, in a 1965 decision, the Supreme Court of Pennsylvania in the case of *Hollinger v. Hollinger*, 416 Pa. 473, modified the rule and stated that the conclusiveness of a sheriff's return does not extend to facts stated in the return of which the sheriff cannot be expected to have personal knowledge and which are based upon information obtained through hearsay or statements made by third persons or to conclusions based upon facts known to the sheriff only through statements made by others. The Court used the examples of <u>when</u> and <u>where</u> service was made as being the type of information that would be known to the sheriff personally and thus be given conclusive effect.

The Assignment Room Judge, in dismissing the plaintiff's preliminary objections, concluded that in a large city, such as Pittsburgh, it would be very unlikely that a deputy sheriff would personally know the defendant to be served. Therefore, he would have to rely on the statements of others as to the identity of the person to be served, which under the *Hollinger* case, supra, would justify a deposition being taken from the deputy sheriff as to his personal knowledge of the defendant.

While the *Hollinger* case modified the

rule in the manner as stated above, the Supreme Court did acknowledge the fact that the rule is generally salutary and worthy of preservation. Therefore, it would seem that in applying the rule as modified, it is incumbent on the hearing judge to consider all of the surrounding facts and circumstances so that an injustice will not be done. The entire Court record of the instant case, which was not called to the Assignment Room Judge's attention, and which was not considered by him in dismissing the plaintiff's preliminary objections, reveals the following facts:

On July 12, 1967, a divorce action was filed by plaintiff against the defendant and the service in question was made by the deputy sheriff on August 10, 1967.

On August 31, 1967, a petition for counsel fees and alimony pendente lite was personally served on the defendant by Constable John Haney and a hearing date of September 7, 1967 was fixed by the Court.

The defendant failed to appear and the Court made an order granting the plaintiff alimony pendente lite in the amount of $1,300.00 per month and counsel fees in the sum of $3,500.00, plus expenses of $233.70.

The defendant moved from the jurisdiction of the Court and took up residence in the State of Florida.

On November 24, 1967, the defendant was personally served at the Martin County Memorial Hospital, Stuart, Florida, with a copy of the order of court handed down by Judge Ruggero Aldisert on September 7, 1967. The defendant recognized this order for alimony by making partial payments.

On March 15, 1968, a rule to show cause why judgment should not be entered against the defendant for $8,163.25, the amount of the accumulated arrearages in the alimony

pendente lite payments, expenses and counsel fees, was issued by Judge Aldisert of this Court, returnable April 8, 1968.

On March 25, 1998, this rule was served on the defendant in the state of Florida.

On April 8, 1968, Judge John G. Brosky of this Court entered judgment in favor of Loretta R. Malley and against the defendant William L. Malley in the sum of $8,163.25.

On the same day, the defendant, through his Pittsburgh attorney, appeared solely for the purpose of contesting jurisdiction and caused a rule to be issued to show cause why service should not be quashed and all orders and proceedings herein stricken. It is to this order that the plaintiff's preliminary objections were filed.

From the record of this case, it is obvious that as early as August 31, 1967, when the petition for counsel fees and alimony pendente lite was personally served on him, the defendant knew that a divorce action had been filed by his wife. The fact that he did not raise the question of jurisdiction until nine months later and after he had been served with numerous other papers, involving the divorce proceedings, raises a strong presumption that the defendant was personally served by the deputy sheriff on August 10, 1967, in accordance with the deputy sheriff's return.

Furthermore, there is a strong presumption that the defendant waived any defect in the service by making the alimony pendente lite payments and by failing to attack the service until eight months after Constable Haney had personally served him with the alimony petition.

Where a court has general jurisdiction over the subject matter of the litigation, any irregularity in the method by which the court obtains jurisdiction of a particular

case is usually waived by failure to raise the objection timely. *Papencordt v. Masterwork Paint Co.*, 412 Pa. 508, 511. In the case of *Drury v. Zingarelli*, 198 Pa. Superior Ct. 5, 9, the Court held that defects in service may be waived by delay and by participance in the case.

In the instant case, we not only have an eight months' delay in raising the question of defective service, but we have participation in the case by the payment of alimony pendente lite after the proper court order was entered. Apparently, the defendant had no intention of contesting the service of the writ until the Court, on March 15, 1968, issued a rule to show cause why judgment should not be entered on the alimony, expenses, and counsel fee arrearages and until after the defendant left the jurisdiction of the Court.

Therefore, it is the opinion of this Court that the defendant has waived any defects there might be in the service and the preliminary objections filed by plaintiff to the defendant's rule to show cause why service should not be quashed should be made absolute and the order of court dated October 23, 1968, dismissing the preliminary objections of the plaintiff should be vacated.

ORDER OF COURT

AND NOW, to-wit, this 13th day of June, 1969, IT IS ORDERED AND DECREED that the order of court dated October 23, 1968, dismissing the plaintiff's preliminary objections is hereby vacated; that the plaintiff's preliminary objections filed June 18, 1968, are hereby granted; and that the petition of the defendant for a rule to show cause why service should not be quashed is hereby dismissed.

By the Court: //s// LEWIS, J.

THE SUPERIOR COURT OF PENNSYLVANIA)
)SS:
COUNTY OF ALLEGHENY)

The Commonwealth of Pennsylvania

TO THE JUDGES of the COURT OF COMMON PLEAS, CIVIL DIVISION, for the County of ALLEGHENY Greeting.

Whereas, By virtue of our Writ of Certiorari at No. 295 of April Term, 1969 of our Court, a record in the matter of the appeal of WILLIAM L. MALLEY from the order of June 13, 1969, of your said Court at No. 431 October Term, 1967 was brought into our Superior Court and the said cause was there so proceeded in that on the 4th day of December A.D. 1969 the following decision was rendered, viz:

Order affirmed.

PER CURIAM

Wherefore, We hereby remit you the record aforesaid with the proceedings thereon, and all things touching the same so far as in this Court they remain, for the purpose of execution as to justice shall appertain, in accordance with the decision of our said Superior Court as foresaid.

Witness the Honorable J. COLVIN WRIGHT, Doctor of Laws, President Judge of our said Superior court at Pittsburgh, the 16th day of December in the year of our Lord one thousand nine hundred and sixty-nine.

CERTIFIED FROM THE RECORD

/s/ Helen D. Steele
Deputy Prothonotary

/s/ Michael F. Coyne
Prothonotary

/s/ Jody Gormon
Deputy.

IN THE SUPREME COURT OF PENNSYLVANIA

LORETTA R. MALLEY Docket No. 3212A

v.

WILLIAM L. MALLEY

January 16, 1970, Petition of William L. Malley for the allowance of an appeal from the judgment of the SUPERIOR COURT at No. 295 April Term, 1969 filed.

January 23, 1970, Answer filed.

ORDER

AND NOW, to wit, this 3rd day of August, 1970, the within petition for allowance of appeal is hereby denied. PER CURIAM.

EXCERPT FROM THE RECORD

COMMONWEALTH OF PENNSYLVANIA }
Allegheny County }

I, John P. Joyce, Prothonotary of the Court of Common Pleas, in and for said County, certify that the foregoing is a full and correct copy of the whole record of the case therein stated, wherein LORETTA R. MALLEY plaintiff and WILLIAM L. MALLEY defendant, as the same remains of record before the said Court, at No. FD6561 of Term A.D. 1989.

In Testimony Whereof I have hereunto set my hand, and affixed the seal of the said Court, TWENTY FIFTH day of SEPTEMBER A.D. 1991.

//s// John P. Joyce, Prothonotary

ADDITIONAL EXCERPT FROM THE RECORD

JUDGMENT DOCKET ENTRIES
Defendant, WILLIAM L. MALLEY
Plaintiff, LORETTA R. MALLEY

No. 431 OCTOBER TERM 1967

DATE OF JUDGMENT	AMOUNT
04/08/68	$ 8,163.25
09/22/70	20,400.00
11/03/71	9,800.00
12/11/72	9,492.00
09/18/74	13,448.00
12/26/79	42,797.00
01/31/84	33,884.68
08/29/90	104,128.43

IN THE CIRCUIT COURT OF THE 15TH JUDICIAL CIRCUIT OF FLORIDA, IN AND FOR PALM BEACH COUNTY.

CASE NO. CD 90-8853 FA

IN RE: THE MARRIAGE OF

WILLIAM LEE MALLEY,

Petitioner/Husband,

and

LORETTA R. MALLEY,

Respondent/Wife,
_____/

FINAL JUDGMENT

THIS MATTER came on for trial July 2 and July 3, 1991, upon the "Husband's" Petition for Dissolution of Marriage, in which he sought, inter alia to ratify and affirm a Mexican Divorce Decree rendered August 1, 1967. The "Wife" filed a Counter-Petition for Dissolution of Marriage seeking equitable distribution, permanent periodic alimony, attorney's fees, suit money and other relief. The "Husband" filed an Answer to the Counter-Petition and alleged the affirmative defense of estoppel based upon her conduct and based upon the fact that she had held herself out to be a single person. The "Husband" was present, testified and represented by Peggy Rowe-Linn, Esquire. The "Wife" was present, testified and represented by Lewis Kapner, Esquire. The Court after hearing the testimony of the parties, their witnesses, considering the documentary evidence, argument of counsel and being otherwise fully

advised in the premises finds that "Wife", LORETTA MALLEY is barred by the doctrine of latches, estoppel, waiver, or a combination of either or all of them from challenging the validity of the Mexican Divorce Decree. The Court further funds that "Wife", LORETTA MALLEY, filed an action to domesticate a foreign judgment, to set aside fraudulent conveyances and other matters in this action. The Court struck those causes of action in this case and makes no ruling on the merits of any of those claims. The Court further finds that both parties have ample funds from which to pay an attorney for the litigation that has just concluded, and each is equally capable of carrying his or her own attorney's fees, suit money and costs in this litigation.

It is thereupon ORDERED AND ADJUDGED:

1. The Mexican Divorce Decree rendered August 1, 1967 is adjudged to be valid and the Court ratifies and affirms said Mexican Divorce Decree.

2. The "Husband's" Count for Dissolution of Marriage is denied as moot and therefore neither party is entitled to financial relief thereunder.

3. The "Wife's" Counter-Petition for Dissolution of Marriage is denied as moot and therefore neither party is entitled to financial relief thereunder.

4. The parties' claims for attorney's fees, suit money and costs is denied.

DONE AND ORDERED this 19th day of August, 1991 at West Palm Beach, Florida.

//s//John L. Phillips
Circuit Court Judge